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In The

# Supreme Court of the United States

October Term, 1994

PAUL PFINGST, District Attorney of San Diego County, California,

*Cross-Petitioner,*

*vs.*

SYCUAN BAND OF MISSION INDIANS, *et al.*,

*Cross-Respondents.*

*On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF IN OPPOSITION FOR CROSS-RESPONDENT SYCUAN BAND OF MISSION INDIANS

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## CONCISE SUMMARY OF CASE

For the reasons set forth below in Petitioner's Rule 15.1 Statement, Cross-Petitioner's "Summary of Facts" is an unreliable basis for this Court's consideration of the Cross-Petition. For an accurate recitation of the material facts in this case, Petitioner Sycuan Band of Mission Indians ("Sycuan") refers the Court to the Factual Background set forth in its pending Petition for Writ of Certiorari ("Sycuan Pet.") at 11-17, and the District Court's factual findings, set forth in Sycuan Pet. at App. B, App. E, and App. I. Petitioner further corrects and rectifies omissions in the Cross-Petitioner's factual statements as follows.

It is undisputed, and the District Court found, that Sycuan established its gaming operation on the Sycuan Indian Reservation in 1983 in order alleviate the severe economic depression, unemployment, substandard housing and sanitation conditions, and other deprivations of basic services that had long afflicted the Reservation community. Sycuan Pet. at App. B-2, App. K-3 to K-4. It is also undisputed that Sycuan, as the owner and operator of its facility, uses its gaming revenues to provide employment to Tribal members, and to fund a broad variety of essential governmental and social services and programs, including public safety and fire protection, medical, dental and ambulance service, educational scholarships, cultural, senior and nutritional programs, water and sanitation facilities and services, and housing development and rehabilitation. Sycuan Pet. at App. B-2 to B-3, App. K-4 to K-6.

The Cross-Petition challenges the Court of Appeals' affirmance of the District Court's exercise of jurisdiction to enjoin: (1) the State's criminal prosecution in State court of individuals whom the local sheriff and District Attorney alleged were offering unlawful electronic games at Sycuan's gaming facility; and (2) further seizures by the sheriff of such gaming equipment, records and cash.

The local sheriff and District Attorney had unilaterally determined that the electronic pulltab dispensers used by Sycuan constituted Class III devices, rather than permissible "technologic aids" to the Class II game of pulltab expressly permitted by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"). The sheriff and District Attorney also unilaterally determined, based on a memorandum from California's Attorney General, that the dispensers qualified as "slot machines" under California law, that California law prohibited their use on Indian Reservations, and that the State had jurisdiction to enter the Reservation, seize the dispensers and other items, and criminally prosecute Tribal employees. *See* Sycuan Pet. at App. B-11.

After declining Sycuan's invitation to discuss the matter on a government-to-government basis, *see* Sycuan Pet. at App. K-9, the sheriff obtained search warrants from the municipal court, and dozens of sheriff's deputies raided the Sycuan gaming facility and seized the electronic pulltab dispensers, cash, and records. Thereafter, Cross-Petitioner commenced prosecution of Sycuan's business manager for violations of State gambling laws.

Sycuan sued to enjoin future raids of its business by the sheriff, as well as the prosecution of its business manager, on the grounds, *inter alia,* that IGRA unambiguously provides: "The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws." 18 U.S.C. § 1166(d). Sycuan further relied on this Court's ruling in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), that California regulates, rather than criminally prohibits, gambling, thereby divesting California of any criminal jurisdiction over gambling offenses in Indian country that California otherwise might have had under Public Law 83-280, codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 ("P.L. 280"). In addition, prior to and throughout this litigation, Sycuan steadfastly has maintained that the seized pulltab dispensers are

neither "slot machines" nor Class III devices, but rather are "technologic aids" to the Class II game of pull-tab, and as such are expressly permitted by IGRA in the absence of a Tribal-State compact. 25 U.S.C. § 2703(7)(A)(i).[1] This latter question is the subject of Sycuan's pending Petition for Writ of Certiorari in this case.[2]

Both the District Court and the Court of Appeals agreed with Sycuan that regardless of whether the seized dispensers constituted Class II or Class III gaming devices for purposes of IGRA, the State had no jurisdiction to make its own determination and undertake unilateral enforcement action and prosecution against such electronic gaming on Indian lands. This result is supported by the plain, unambiguous language of the pertinent jurisdictional statutes, by this Court's ruling in *California v. Cabazon*, and by every other federal court that has addressed the issue. It is this result that Cross-Petitioner would have this Court review.

Cross-Petitioner's argument necessarily would empower any State or local law enforcement agency or individual officer to make the determination — at its sole discretion — to stop a Tribe from engaging even in Class II gaming by summarily seizing equipment, cash and records, arresting and initiating

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1. The Court of Appeals conceded that this is a close question. Sycuan Pet. at App. A-18. The District Court held that the seized dispenser "is itself the game of pulltab." *Id.* at App. E-10. The game of pulltab is expressly authorized by California Penal Code § 328.5(o). The New Mexico Court of Appeal agreed with Sycuan's position that the electronic version of pulltab is nevertheless the Class II game of pulltab. *Infinity Group, Inc. v. Manzagol*, 884 P.2d 523, 526, 118 N.M. 632, *cert. denied*, 882 P.2d 1046, 118 N.M. 533 (1994).

2. Sycuan was not a party to, and the Autotab 101 pulltab dispensers seized at Sycuan were not at issue in, *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994), *cert. denied*, 114 S. Ct. 2709 (1994).

prosecutions of Tribal officials and employees and, in effect, completely disrupting or even forcing the closure of a Tribal gaming facility. During the pendency of the inevitable judicial proceedings following such action, the Tribal government would be deprived of the revenues that Congress intended it should have to support its governmental functions and programs, Tribal members would be denied the employment opportunities that Congress intended be conferred through Tribal gaming, and the entire Reservation community would be deprived of the economic benefits that Congress intended should be available to Reservation communities through Tribal governmental gaming.[3] Such an outcome would, in short, render both IGRA and this Court's decision in *California v. Cabazon* dead letters.

## SUMMARY OF REASONS FOR DENYING THE WRIT

The Cross-Petition does not present any "special or important reasons" for review, as required by Supreme Court Rule 10.1. There is no conflict among the Courts of Appeals, or between the State and federal courts, on the jurisdictional issues presented. The jurisdictional statutes at issue are unambiguous and do not require this Court's interpretation. Finally, the decision below is entirely consistent with this Court's prior decisions. The sole purpose of the Cross-Petition is to persuade this Court to eliminate the jurisdictional foundations of IGRA, to effectively repudiate its ruling in *California v. Cabazon,* and to deliver to the State what the State did not even have before IGRA and *California v. Cabazon:* Unfettered State jurisdiction over *all* forms of Indian gaming in Indian country. Such a result not only is legally insupportable, but would eviscerate IGRA and economically devastate Tribes across the nation.

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3. The District Court based its injunction, in part, on Sycuan's uncontroverted showing that it was irreparably harmed by the seizure of the pulltab dispensers, which deprived the Tribe of "income necessary to provide basic governmental services and to provide employment to its members." Sycuan Pet. at App. I-20.

## RULE 15.1 STATEMENT

Pursuant to Supreme Court Rule 15.1, Sycuan hereby addresses the pertinent misstatements of fact and law made by counsel for Cross-Petitioner. These numerous and material misstatements render Cross-Petitioner's "Questions Presented", "Summary of Facts", and "Reasons for Granting the Writ", an unreliable basis for this Court's consideration of the Cross-Petition. Moreover, in a transparent effort to bias the Court against Indian gaming, Cross-Petitioner repeatedly asks the Court to take judicial notice of sensational "facts" that are not facts at all, much less relevant to the jurisdictional issues presented.

1. Cross-Petitioner incorrectly states that Sycuan installed "slot machines prohibited under the California Penal Code", and that "[i]t was never seriously disputed by the Tribes that, if permitted to do so, the District Attorney could prove that the confiscated devices did, in fact, constitute 'slot machines' within the meaning of Cal. Pen. Code § 330.1." Cross Petition at 5 and footnote 3. Rather, the record reflects[4] that Sycuan consistently has contended — from its pleadings to its pending Petition — that the gaming equipment that County officials seized are *not* "slot machines" and that the legal status of that equipment is to be determined by federal law,[5] not California law as Cross Petitioner has urged throughout these proceedings.

2. Throughout his "Summary of Facts" and "Reasons for Granting the Writ", Cross Petitioner relies on the flawed syllogism that because the seized equipment constituted "slot

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4. *See, e.g.*, Sycuan Pet. at App. L-2 to L-8.

5. Including IGRA and this Court's criminal/prohibitory-civil/regulatory test set forth in *California v. Cabazon Band*, 480 U.S. 202 (1987).

machines", and because slot machines are criminally prohibited by California, therefore California and its agents had jurisdiction to seize the equipment. However, there is no finding in the record that the seized equipment constituted slot machines.[6] Moreover, contrary to Cross-Petitioner's repeated contention (*e.g.* Cross-Petition at 8), under *California v. Cabazon* California does not "categorically prohibit" slot machines; indeed, California does not "prohibit" slot machines at all. Although California Penal Code sections 330a, 330b and 330.1 purport to proscribe the possession and operation of slot machines for gambling purposes, the California Court of Appeal recently determined that subsequent legislation authorizes the California State Lottery to utilize what California law defines as slot machines in the operation of the Lottery's games. *Western Telcon, Inc. v. Calif. State Lottery,* 43 Cal. Rptr. 2d 747 (1995), *petition for hearing pending.*[7] Moreover, section 326.5(o) of the California Penal Code expressly authorizes use of at least some forms of what Penal Code section 330c defines as slot machines. In *Rumsey Indian Rancheria v. Wilson,* 41 F.3d 421 (9th Cir. 1994), the Ninth Circuit remanded to the District Court the determination whether California allows the operation of slot machines, through the State Lottery or otherwise, but has stayed its mandate in order to review supplemental briefs on the significance of *Western Telcon. See* Order, Aug. 21, 1995 (9th Cir. 1995).

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6. Instead, the undisputed record shows that the seized pulltab dispensers lack most of the attributes commonly associated with "slot machines." Specifically, the dispensers are not actuated by handles, have no spinning reels, do not dispense coins or currency, and perhaps most significantly, offer a fundamentally different game than does a "slot machine." *See* Sycuan Pet. at 11-17 for a full description of the seized game.

7. *Western Telcon* held that the State Lottery's computerized, on-line keno game is lawful even if it is a slot machine, because the State Lottery is exempt from sections 330 *et seq.* of the Penal Code.

3. Cross-Petitioner incorrectly states that "[t]here is an unresolved question whether criminal proceedings were actually ever initiated against Viejas Tribal Chairman Anthony Pico, a member of the Viejas Tribe and the only Indian alleged to be among the criminal defendants." Cross-Petition at footnote 5. In fact, Cross-Petitioner's Answer in the District Court *admitted* that criminal proceedings had been initiated against Mr. Pico. The District Court adopted this binding admission, and Cross-Petitioner's belated and unsubstantiated attempt to revoke his earlier admission was rejected, as Cross-Petitioner himself points out, by the Court of Appeals. In any event, the status of those persons as Indians or non-Indians was irrelevant to the District Court's and the Court of Appeals' determination that the District Attorney had no jurisdiction to prosecute those persons for alleged violations of California's gaming laws on the respective Reservations.

4. At page 9, footnote 7, the Cross-Petitioner asks the Court to take judicial notice of the "fact" that Class III gaming in the absence of a Tribal-State compact "is wholly without oversight by any federal or State agency; the National Indian Gaming Commission has jurisdiction to monitor only *class II* gaming." To the contrary, IGRA gives the NIGC broad authority to enforce IGRA's terms, including the power to stop unlawful Class III gaming. 25 U.S.C. § 2713. NIGC has in fact issued and enforced cease and desist orders against Tribes and persons operating Class III games in the absence of a compact.[8]

5. In his request for "judicial notice" at page 13 footnote 10, Cross-Petitioner apparently asserts that the State's jurisdictional prerogatives are enhanced by the fact that the Sycuan Indian Reservation was established by a post-statehood Executive

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8. *See, e.g., National Indian Gaming Commission v. Lummi Indian Business Council*, No. Indian 94-1, June 9, 1995 (NIGC Notice of Violation sustained by administrative law judge and NIGC chairman).

Order, rather than by a reservation in the Act of Admission. This Court long ago rejected such a distinction. *See United States v. McGowan*, 302 U.S. 535, 538-39 (1938). *See also, Arizona v. California*, 373 U.S. 546, 597 (1963), *decree entered*, 376 U.S. 340 (1964) (a post-Statehood executive order creating Reservations in California effected the reservation of federally-protected *Winters* water rights to the beneficiary Tribes).[9]

6. Cross-Petitioner at page 13 misstates the law in arguing that this Court should apply a balancing test in the area of regulation of Indian gaming. This request ignores (1) that Congress expressly preempted the field and admonished the federal courts against balancing of interests, Sen. Rep. No. 100-446, 1988 U.S.C.C.A.N., 100th Cong., 2d Sess., 3076, 3105, and (2) independent of actual games, the Tribes and the federal government have paramount interests in precluding State jurisdiction except through compact negotiation process; the State's desire to acquire jurisdiction that it would not otherwise have in the absence of IGRA (*see California v. Cabazon*) is the incentive to negotiate compacts. *See* Senate Report No. 100-446, *supra*, at 3075-76.

7. At page 13 footnote 11, Cross-Petitioner disregards the record when he states: "If the Tribes had harbored any genuine doubts about whether these machines constituted class III gaming, the Tribes could have brought an action against the San Diego County Sheriff for a declaration as to their status." Apart from the fact that Sycuan genuinely believed — and continues to

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9. In *Arnett v. 5 Gill Nets*, 48 Cal. App. 3d 454 (1975), and in *People v. McCovey*, 36 Cal. 3d 517 (1984), the California Court of Appeal and the California Supreme Court both rejected the jurisdictional significance of the fact that reservations were created after statehood. If that fact lacks significance in a natural resource context, it clearly lacks significance in the context of allocating jurisdiction over Indians and Indian country. Otherwise, P.L. 280 itself would have been unnecessary, and perhaps unconstitutional.

believe — that the dispensers are Class II,[10] the record before the District Court reflects that Sycuan relied on a business license issued by Los Angeles County to the vendor of the seized Autotab 101 dispensers. Sycuan Pet. at App. K-8. Sycuan consulted the U.S. Attorney before installing the machines, *id.*, and in good faith tried to engage the State law enforcement authorities in a government-to-government dialogue. *Id.* at App. K-9. Sycuan had no reason to seek declaratory relief until the local sheriff took unilateral action.

8. Cross-Petitioner incorrectly contends at page 7 that the Court of Appeals "did not opine upon the compatibility" of IGRA with P.L. 280. Citing *United Keetoowah Band*, 927 F.2d 1170 (10th Cir. 1991), the Court of Appeals specifically held:

> If that exclusivity is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by section 1166(d). . . . Whether IGRA has made broader inroads on Public Law 280 we need not decide; it has clearly made criminal enforcement of the Sate's laws prohibiting "slot machines" the exclusive province of the federal government.

Sycuan Pet. at App. A-11 to A-12.

9. Cross-Petitioner's request at footnote 15 for judicial notice of pleadings in the *Soboba* case is grossly misleading. Cross-Petitioner continues his misplaced reliance on Penal Code sections 330 *et seq.*, ignores the ruling of *Western Telcon, supra,* and mischaracterizes the substance of the *Soboba* bad faith lawsuit, *viz.*, that despite a contractual (and IGRA) obligation to

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10. *See supra,* note 1.

do so,[11] the State would not even agree to meet with the Tribe, let alone negotiate over either the scope of games *or* non-litigated regulatory provisions. The State erected spurious preconditions even to the negotiation of simulcast compact terms previously approved by the State.[12] The proliferation of litigation results not from any inadequacy of the *Cabazon* standard, but from the State's persistent refusal to recognize the status of Tribes as governments, and Tribal rights under IGRA.

10. In footnote 18, Cross-Petitioner inappropriately asks the Court to take judicial notice of newspaper reports of the actions of United States Attorneys, and inaccurately describes the terms of the standstill agreement between the San Diego U.S. Attorney and three Tribes.[13] The State would prefer the U.S. Attorney to close down Indian gaming and thereby reward the State for refusing to negotiate Tribal-State compacts in good faith.

11. Cross-Petitioner's footnote 19 is a transparent attempt to prejudice the Court by dredging up dated events which, ironically, demonstrate how closely the Tribes work with the federal authorities. Apart from the inappropriate request that the Court judicially notice various newspaper articles based on counsel's own press releases, the proffered "facts" are spurious.

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11. *Rumsey* was litigated pursuant to a Litigation Agreement executed by the State of California and numerous Tribes, including Sycuan and the Soboba Band. The agreement obligated the State to negotiate any games held permissible by the district court, even pending any appeal. The State refused to do so, thereby breaching its agreement.

12. *See Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994).

13. In his apparent attempt to slander the U.S. Attorney, Cross-Petitioner fails to note that the Rincon Band's claim of unfair treatment did not stop the U.S. Attorney from shutting down Rincon's gaming operation. *See United States v. Rincon Band of Mission Indians*, S.D. Cal. No. 95-557 (1995).

The attempted Rincon infiltration took place eight years ago (not in the 1995 case cited by Cross-Petitioner), and was reported *by the Tribe*. The resulting federal prosecution was successful.[14] Cross-Petitioner's references to unsubstantiated news reports about violence is reprehensible; such violence either did not happen as reported, or did not occur in the casinos or involve the gaming activity. More to the point, the presence or absence of Class III gaming, or State or federal jurisdiction, has nothing to do with any such disputes, and State jurisdiction would not prevent them. When federal authorities believe there is a problem warranting federal action, they have demonstrated that they know what to do about it.[15] Moreover, the State has jurisdiction under P.L. 280 to prosecute for assault and battery.

12. At page 22, Cross-Petitioner incorrectly asserts that Sycuan has no jurisdiction to regulate "slot machine" gaming (whatever "slot machines" may be). Even if the Johnson Act, 15 U.S.C. § 1171, *et seq.*, could be construed to divest the Band of the power to *authorize* slot machines on its Reservation, it did not divest the Band of the power to preclude their use. Indeed, IGRA specifically preserves the inherent power of Tribes to render Class III gaming illegal on Indian lands with or without a compact. *See* 25 U.S.C. §§ 2710(d)(1)(D)(i), 2713(d).

## JURISDICTION OF THE COURTS BELOW

The Sycuan Band invoked the District Court's original jurisdiction under 28 U.S.C. §§ 1331, 1343, 1337 and 1362,

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14. As it did in *Cabazon v. California*, the State continues to beat the drum of organized crime "infiltration", but has no more evidence of such infiltration now than it had then.

15. *See, e.g., United States v. Rincon Band of Mission Indians*, S.D. Cal. No. 95-557 (1995); *United States v. E.C. Investments, Inc.*, No. CR-94-361-RG (C.D. Cal.), *app. pending*, No. 94-5063 (9th Cir.).

alleging claims arising under 42 U.S.C. § 1983 and 25 U.S.C. § 2701, *et seq.* ("IGRA"). The District Court found that Sycuan's claims concerning the extent to which the County of San Diego had jurisdiction to enforce California's gaming laws on the Sycuan Reservation, and Sycuan's claims concerning the status of certain gaming equipment as permissible "computer, electronic or technologic aids" to the Class II game of pulltab, arose under the laws of the United States within the meaning of 28 U.S.C. § 1331. Because the District Court ruled against Sycuan on its claims regarding the classification of the dispensers, the District Court did not have to decide whether it also had jurisdiction under 28 U.S.C. § 1343, and in fact did not make such a determination.

The District Attorney filed an interlocutory notice of appeal from the District Court's grant of provisional injunctive relief. That appeal later was abandoned and dismissed.

Both the District Court and the Court of Appeals rejected the District Attorney's contention that the abstention principles of *Younger v. Harris*, 401 U.S. 37 (1971), compelled dismissal of the action.

## REASONS FOR DENYING THE WRIT

### I.

### THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE CONTROLLING DECISIONS OF THIS COURT, THE EXPRESS LANGUAGE AND INTENT OF IGRA, AND ALL JURISDICTIONAL STATUTES.

In 1987, this Court held in *California v. Cabazon, supra*, that Public Law 280 had not conferred upon California authorities

jurisdiction to enforce State and County bingo and card gambling laws in Indian country. The Court held that those laws merely regulated such gaming activity, while P.L. 280 granted the State jurisdiction only to enforce laws that criminally prohibit conduct as a matter of public policy.

In 1988, Congress enacted IGRA, 25 U.S.C. § 2701, *et seq.*, in part to codify this Court's decision in *Cabazon*[16] so that Tribes located in States that do not criminally prohibit virtually all forms of gaming as a matter of public policy would be able to utilize gaming for governmental purposes free from harassment and interference by State or local authorities. *See United Keetoowah Band of Cherokee Indians v. Oklahoma, ex rel. Moss,* 927 F.2d 1170, 1176-81 (10th Cir. 1991); Sen. Rep. No. 100-446, 1988 U.S.C.C.A.N., 100th Cong., 2d Sess. 3071.

The first ground for the decision of the Court of Appeals was that under *California v. Cabazon, supra,* California regulates gaming in general, rather than criminally prohibiting such activity as a matter of public policy, and thus that California does not have jurisdiction under P.L. 280 to enforce the laws at issue. The soundness of this conclusion has been validated as a matter of California law by the recent decision of the California Court of Appeal in *Western Telcon, Inc. v. Calif. State Lottery, supra.*

The Court of Appeals also ruled that to the extent that the State ever might have had jurisdiction under P.L. 280 to enforce the laws at issue, that grant of jurisdiction impliedly was repealed by IGRA's allocation to the United States of *exclusive* jurisdiction to enforce state gambling laws in Indian country if such activity does not constitute Class I gaming, Class II gaming, or Class III gaming that is authorized by a Tribal-State compact. Sycuan Pet. at App. A-11.

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16. *See* 25 U.S.C. § 2701(5).

A central component of IGRA is 18 U.S.C. § 1166, which provides:

> Subject to subsection (c), all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

Section 1166(b) makes the violation of the State laws extended to Indian country by section 1166(a) punishable in the same manner as provided by State law.[17]

However, 18 U.S.C. § 1166(d) provides:

> *The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws* that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior . . ., or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

*Id.* (emphasis added). The Court of Appeals correctly construed

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17. 18 U.S.C. § 1166(c) excludes from the definition of "gambling," "(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect."

18 U.S.C. § 1166(d) as a "highly explicit limitation on [State] jurisdiction to enforce" the State laws assimilated into federal law by § 1166(a), (b) and (c). Sycuan Pet. at App. A-8. Moreover,

> The Bands have not consented to the transfer of criminal jurisdiction to the State. As far as IGRA is concerned, therefore, the State had no authority to prosecute the Bands' employees for conducting the Bands' gaming.

*Id.*

This conclusion by the Court of Appeals, based on the plain language of IGRA, is manifestly correct, and is completely consistent with the decisions of every other Court of Appeals that has considered this question. *See, e.g., United Keetoowah Band, supra; Seneca-Cayuga Tribe v. Oklahoma, ex rel. Thompson,* 874 F.2d 709 (10th Cir. 1989); *Lac du Flambeau Band of Lake Superior Chippewa Tribes v. Wisconsin,* 957 F.2d 515 (7th Cir. 1992), *dismissing appeal from* 743 F. Supp. 645, 648 (D. Wisc. 1990) (IGRA "established a comprehensive scheme for the regulation of gaming on Indian lands"); *Sisseton-Wahpeton Sioux Tribe v. United States Department of Justice,* 718 F. Supp. 755 (D.S.D. 1989), *rev'd on other grounds,* 897 F.2d 358 (8th Cir. 1990) ("IGRA is a comprehensive and pervasive piece of legislation that in many respects preempts other federal laws that might apply to gaming").

Cross-Petitioner's contention that the Court of Appeals "did not opine upon the compatibility" of IGRA with 18 U.S.C. § 1162 (P.L. 280) is incorrect. Citing *United Keetoowah Band, supra,* the Court of Appeals specifically held that,

> If that exclusivity is incompatible with any

> provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by section 1166(d) .... Whether IGRA has made broader inroads on Public Law 280 we need not decide; it has clearly made criminal enforcement of the State's laws prohibiting "slot machines" the exclusive province of the federal government.

Sycuan Pet. at App. A-11 to A-12.[18] Again, this conclusion is manifestly correct based on the plain language of IGRA and this Court's approach to implied repeals.

Under the Court of Appeals' correct analysis, whether a particular Class III gaming activity is merely regulated by State law, or is criminally prohibited by state public policy, may be relevant to the scope of gaming that may be included in a Tribal-State compact; yet it is utterly without significance in determining whether a State has jurisdiction over the activity in the absence of a compact. In either event, jurisdiction to enforce the State laws allegedly violated by the activity rests exclusively with the United States.

If the plain language of 18 U.S.C. section 1166(d) does not suffice to demonstrate that the Court of Appeals properly determined that IGRA vests jurisdiction to enforce State gambling laws in Indian country exclusively in the United States, consideration of the practical effects of a contrary determination — as illustrated by this case — would compel the same result. In this case, the Attorney General of California disregarded clear

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18. As noted above, contrary to Cross-Petitioner's repeated contention, California does not "categorically prohibit" slot machines, or "prohibit" slot machines at all. *See Western Telcon, Inc. v. Calif. State Lottery, supra.*

and controlling judicial and congressional directives[19] and unilaterally decided that California had jurisdiction under P.L. 280 to seize gaming equipment if local authorities determined that the equipment constituted "slot machines" under State law. He urged local authorities to raid Reservations, seize offending equipment and arrest and prosecute those involved in operating the equipment in Indian country. Sycuan Pet. at App. K-9.

Hoping for a government-to-government dialogue as contemplated in IGRA, Sycuan requested meetings with California's law enforcement authorities to explain the Band's position on both the general jurisdictional issue and the specific matter of the legal status of the Autotab Model 101 electronic pulltab dispenser.[20] Sycuan's requests were ignored. Sycuan Pet. at App. K-9.

San Diego County acted as the Attorney General had urged. Ignoring Sycuan's request to meet and attempt to resolve the dispute in a manner respecting the sovereignty of both parties, early on the morning of October 30, 1991, a force of more than eighty San Diego County Sheriff deputies mounted surprise raids on the gaming facilities of the Sycuan, Viejas and Barona Bands of Mission Indians. In those raids, Sheriff's deputies seized equipment, cash and records, and the District Attorney initiated criminal prosecutions against persons believed to be involved in operating the equipment.[21]

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19. *E.g. United Keetoowah Band of Cherokee Indians v. Oklahoma, ex rel. Moss*, 927 F.2d 1170 (10th Cir. 1991); *see also*, Sen. Rep. No. 100-446, 1988 U.S.CC.A.N., 100th Cong., 2d Sess., 3071-72, 3075-76, 3105.

20. When the Sycuan Band acquired the Autotab Model 101 electronic pulltab dispensers, the vendor was licensed by Los Angeles County to sell and service the equipment for charity bingo facilities in that County. Sycuan Pet. at App. K-8.

21. At the Sycuan Reservation, the District Attorney cited Sycuan's business manager, who was not the manager of the gaming facility.

To reverse the jurisdictional decision of the Court of Appeals would destroy the jurisdictional foundation of IGRA and repudiate the principles of *California v. Cabazon*. The bargaining power of States would be immeasurably strengthened, and that of Tribes grievously weakened: Any State or local law enforcement agency or individual police officer would be able — at its sole discretion — to stop a Tribe from engaging even in Class II gaming[22] by summarily seizing equipment, cash and records, arresting and initiating prosecutions of Tribal officials and employees and, in effect, completely disrupting or even forcing the closure of a Tribal gaming facility. Although the legality of such actions could be challenged after the fact, during the pendency of judicial proceedings the Tribal government would lose the revenues that IGRA contemplates it should have to support its functions and programs, Tribal members would lose the employment opportunities that IGRA intended to confer through Tribal gaming, and the entire Reservation community would be deprived of the economic benefits that Congress intended should be available to Reservation communities through Tribal governmental gaming. In short, Tribal governmental gaming could exist only at the sufferance of State and local non-Indian authorities.

Congress intended that compacts negotiated between Tribes and States as equals be the *only* means by which States could acquire jurisdiction over on-Reservation Class III gaming. Indeed, Congress viewed the opportunity for States to acquire such jurisdiction as the primary incentive to State participation in the compact-negotiation process. *See* Sen. Rep. No. 100-446, *supra*, at 3075-76. Construing IGRA as recognizing concurrent State jurisdiction over on-Reservation gaming in the absence of an approved Tribal-State Class III compact would completely undermine that process by eliminating that incentive.

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22. A result expressly proscribed by Congress. Sen. Rep. No. 100-446, *supra*, at 3076, 3104-05.

Given the historic enmity between Tribes and States in general, and the State of California and Indian Tribes in that State in particular,[23] the Court of Appeals correctly decided that Congress properly reserved to federal authorities the exclusive power to initiate and maintain criminal prosecutions of persons accused of violating State gambling laws in Indian country.

## II.

## THE COURT OF APPEALS CORRECTLY REJECTED AN ARTIFICIAL DISTINCTION BETWEEN THE TRIBE AND ITS AGENTS FOR JURISDICTIONAL PURPOSES.

Cross-Petitioner contends that the non-Indian status of at least some of the persons cited by County authorities is of jurisdictional significance. This argument is contrary to this Court's well-established jurisdictional principles, and ignores IGRA's clear contemplation that Tribes will employ non-Indians in the operation of their gaming facilities. In numerous modern cases, this Court repeatedly has held that States lack jurisdiction over non-Indians in Indian country when such jurisdiction has been preempted by federal law, whether or not a specific statute expressly states its preemptive effect. *See, e.g., New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983) (State enjoined from enforcing fish and game laws against non-Indians licensed by Tribe to take game on Reservation; injunction extended to interfering with off-Reservation possession of game lawfully taken on-Reservation); *Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. 832 (1982) (state gross receipts tax on non-

23. This case illustrates that enmity. *See also, Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977) in which County authorities attempted to prevent an Indian family living in a converted chicken coop from moving into a federally-subsidized mobilehome because County zoning laws prohibited mobilehomes in the area in which the Reservation is located.

Indian contractors building school on Reservation preempted); *Central Machinery Co. v. Arizona State Tax Comm'n.*, 448 U.S. 160 (1980) (mere existence of Indian Trader statute preempted State taxation of unlicensed off-Reservation seller of equipment to on-Reservation purchaser).

In *California v. Cabazon, supra,* this Court compellingly refuted Cross-Petitioner's contention. In *Cabazon,* the Morongo Band's bingo enterprise was managed by a non-Indian company, and most of the Band's patrons were non-Indians. Nonetheless, this Court upheld the Ninth Circuit's decision that State and County laws were preempted and thus could not be enforced against such activities in Indian country, because, *inter alia,* federal and Tribal interests in Tribal self-governance and Reservation economic self-sufficiency outweighed relevant State interests. In the instant case, unlike *California v. Cabazon,* there is a specific and comprehensive federal statutory regulatory scheme that explicitly allocates jurisdiction and fully protects any legitimate State interests, leaving no room for State jurisdiction except in accordance with that scheme. *See, e.g., Warren Trading Post v. Ariz. State Tax Comm'n.,* 380 U.S. 685 (1965).

IGRA itself, in 25 U.S.C. § 2711, clearly contemplates that non-Indians may be involved in the operation of Tribal gaming facilities. Under that provision, the National Indian Gaming Commission must approve contracts between Tribes and management companies, and all persons with significant gaming responsibilities or authority are subject to rigorous background investigations. Under Cross-Petitioner's jurisdictional premise, an NIGC-approved non-Indian management contractor would have no protection against arrest, prosecution and conviction by State authorities or the local sheriff for performing the very duties authorized by Congress and the approved contract. Such a contractor would have to assert federal approval as a *defense* to

state prosecution, effectively chilling such activity and eviscerating IGRA as a Tribal economic development tool.

## III.

## THERE IS NO NEED TO RELITIGATE OR CLARIFY THIS COURT'S DETERMINATION IN *CABAZON* THAT CALIFORNIA'S PUBLIC POLICY IS TO REGULATE, NOT PROHIBIT, GAMING FOR THE PURPOSES OF DETERMINING THE EXTENT OF THE STATE'S JURISDICTION TO ENFORCE ITS GAMING LAWS IN INDIAN COUNTRY SUBSEQUENT TO PASSAGE OF IGRA.

Given that California regulates, rather than prohibits, gambling in general, *California v. Cabazon, supra,*[24] Sycuan clearly had sovereignty to regulate gambling within its boundaries even before passage of IGRA. Given also that Congress intended that States and Tribes should negotiate government-to-government compacts for the authorization and regulation of Class III gaming, it is the State's unilateral usurpation of authority over on-Reservation activities, and not Tribal regulation or operation of those activities, that defies Congressional intent and frustrates IGRA's purposes.

That there is litigation between States and Tribes about the extent of State jurisdiction in general is not attributable to this Court's "public policy" test in *Cabazon,* but to State aggression and an unwillingness to recognize and deal with Tribes as

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24. As illustrated by the decision in *Western Telcon, supra,* California has considerably expanded the scope of lawful gaming since *Cabazon* was decided. The State Lottery now operates an on-line, computerized, State-banked (rather than parimutuel) keno game. The same court held that the State Lottery is authorized to offer what California defines as "slot machines," as well as banked games.

sovereign governments. The weapons in that battle may have shifted from bullets to legal briefs, but in virtually every instance, including the non-gaming cases cited by Cross-Petitioner, Tribes have been forced to litigate to protect themselves, their territory and/or their members from State incursions.[25]

Even the IGRA litigation to which Cross-Petitioner refers is not attributable to *Cabazon's* "public policy" test, but to the State's resistance to IGRA's basic tenets; *i.e.*, that Tribes are governments, rather than private, for-profit entities subject to inherent State jurisdiction; that Tribes legitimately may use gaming to raise acutely-needed revenues to fund their programs, employ their people and create economic self-sufficiency for their communities; and that Tribes can offer a broad scope of gaming to offset the absence of a tax base, and remote locations that have prevented other forms of economic development.

The State's inability to persuade federal authorities to take action against what the State perceives to be uncompacted Class III Tribal gaming is not a reason for granting the Cross-Petition. First, the status of the gaming equipment that the Sheriff seized in this case remains the subject of litigation, as evidenced by the absence of a final judgment and the Band's pending Petition for Writ of Certiorari in this case. Second, under IGRA and the Johnson Act federal authorities have ample power to take whatever measures they deem necessary to protect the public; that they choose to exercise their authority in the context of the unique federal-Tribal relationship, informed by the State's stonewalling and subversion of the compact negotiation process,[26] is not an argument for destroying the delicate and

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25. In the instant case, the armed incursion by dozens of sheriff's deputies easily could have escalated into a serious confrontation, but for Sycuan's restraint.

26. *See, e.g., Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994), *cert. granted*, 115 S. Ct. 932 (1995), *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994), *pet. for cert. pending*.

comprehensive statutory scheme that Congress has created in IGRA.

## IV.

## THERE IS NO DOUBT THAT SYCUAN'S COMPLAINT CLEARLY PRESENTED AN ACTUAL CASE OR CONTROVERSY.

The Court of Appeals had no difficulty finding a case or controversy and jurisdiction over Sycuan's claims. Sycuan Pet. at App. A-7 to A-8. Cross-Petitioner's attempt to distinguish this case from the situation in *New Mexico v. Mescalero Apache Tribe, supra,* suffers from numerous fatal flaws. First, according to *Western Telcon,* the California Lottery may use what California law defines as "slot machines" in the operation of its keno game; therefore, there is no support in California law for Cross-Petitioner's assertion at page 21 that "slot machine gambling is prohibited as a matter of state law."

Second, California law specifically allows the use of what California law defines as "slot machines." *See* Pen. Code §§ 326.5(o), 330c.

Third, Cross-Petitioner's assertion that the Sycuan Band has no jurisdiction to regulate "slot machine" gaming — whatever "slot machines" may be[27] — simply is wrong as a matter of federal

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27. As noted above, Sycuan has consistently disputed, and the District Court never found, that the seized dispensers are "slot machines." Cross-Petitioner uses that term extremely loosely, based upon the expansive definition of "slot machine" under California law. Although the definition of "slot machine" may have significance in determining the scope of Class III gaming for which a State is obligated to negotiate under IGRA, it clearly has no significance in the allocation of criminal jurisdiction between the State and the United States under IGRA.

law. Even if the Johnson Act, 15 U.S.C. § 1171, *et seq.*, could be construed to divest Sycuan of the power to *authorize* slot machines on its Reservation, it did not divest the Band of the power to preclude their use. IGRA specifically acknowledges the inherent power of Tribes to render Class III gaming illegal on Indian lands with or without a compact. *See* 25 U.S.C. §§ 2710(d)(1)(D)(i), 2713(d).

Finally, and more fundamentally, the real question presented by the Cross-Petition (and already answered by this Court and others) is not whether particular equipment is Class II or Class III,[28] but whether the State has the authority to make and enforce that determination unilaterally and without resort to either IGRA's compacting process or a forum that respects the Tribe's governmental status. It would be difficult to imagine a more immediate or serious case or controversy than a dispute over the State's jurisdiction to invade a Tribe's Reservation, halt *all* gaming activity during the execution of an invalid State court search warrant that results in the seizure of Tribal funds and records, and then prosecute Tribal employees for doing their Tribally- and federally-approved jobs.[29]

When the sheriff's invasion force arrived, the Band had two options: (1) physically resist the *ultra vires* actions of the officers; or (2) avoid a confrontation and seek recourse in the United States District Court. If this Court were to rule that the Band's complaint failed to allege a cognizable case or controversy, the Band would be deprived of its second option, substantially increasing the risk of violent conflicts between Tribes protecting the economic lifeblood of their Reservations,

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28. That is the issue presented by Sycuan's pending Petition for Writ of Certiorari.

29. In the case of the prosecution of Sycuan's business manager, he was not even responsible for the operation of Sycuan's gaming facility.

and hostile State authorities intent upon destroying Tribal self-sufficiency.

## V.

## THIS ACTION IS NOT BARRED BY 28 U.S.C. § 2283.

Cross-Petitioner does not overcome the obvious federal interest in, and plain jurisdictional basis for, the District Court's enforcement of IGRA and the ouster of State jurisdiction by way of the court's injunctive power. He also disregards the other major component of this action, namely the *declaratory judgment* in favor of Sycuan. 28 U.S.C. § 2202 leaves no doubt that if the State failed to comply with the terms of such declaratory relief, Sycuan could then obtain an injunction to enforce those terms. *See, e.g., Doe v. Gullinot*, 657 F.2d 1017 (9th Cir. 1981). Cross-Petitioner's argument that the action is barred by 28 U.S.C. § 2283 is frivolous.

## VI.

## *YOUNGER V. HARRIS* IS NOT A BAR TO THIS ACTION.

Cross-Petitioner premises his *Younger v. Harris* argument on his continuing error that the State has jurisdiction to prosecute "slot machine" gambling on Indian lands. This position is frivolous, and Cross-Petitioner offers no indication that the analysis of the Court of Appeals is erroneous. He also forgets that this action is as much about the seizure of equipment, cash, and records as it is about prosecution of individuals. Finally, because this case involves fundamental federal issues of Tribal sovereignty, *Younger v. Harris* simply has no application. *See, e.g., Moe v. Confederated Tribes*, 425 U.S. 463, 470-75 (1976).

## CONCLUSION

The decision of the Court of Appeals is completely consistent with the controlling precedents of this Court, as well as with IGRA. The Cross-Petition offers no special or important reason for review. For the reasons set forth above, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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